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Introduction

The recent decisions in *Richard v BBC*[1] and *Ali v Channel 5 Broadcast Ltd*[2] have highlighted the need for the media to employ professional broadcasting in order to protect individuals whose private life is affected by the transmission of public interest stories. In *Richard*, the High Court made it clear that it would challenge the tactics employed by the media,[3] including the exercise of any editorial judgement on their part, if those tactics, including the motive behind them, amounted to a disproportionate interference with individual privacy. In particular, that decision suggests that the potential success of any public interest defence relied on by the media

[1] [2018] EWHC 1837 Ch.

[2] [2019] EWCA Civ 677

[3] In this sense, tactics may cover the way that the personal information is gathered and/or the manner in which that information was portrayed in the broadcast. The author will attempt to stress any differences throughout, including the relevance of the broadcaster's motive in gathering and/or portraying that information.

might be affected if the court finds that the tactics are employed simply, or substantially, to make 'good television'. That desire on behalf of the BBC was considered by the judge, not only as exacerbating the harm caused by those tactics to the claimant's privacy,[4] but also in reducing the weight of the public interest arguments when they were balanced against the privacy claim.[5] In other words, in this context making 'good television' was regarded as being equivalent to bad broadcasting practice, and something to be discouraged by the law and the courts. Consequently, if the court was to find that the broadcaster's intention was to make 'good television' - rather than faithfully serve the public interest in publication - the balancing act is more likely to be decided in favour of upholding individual privacy.[6]

It will be conceded later in this article that in both *Richard* and *Ali*, the public interest defence may have failed for other reasons. Nevertheless, it is contended that the courts' acceptance of the negative factor of 'good television' can detract from the strength of any public interest defence and thus compromise media freedom and freedom of expression. The recent decision of the Court of Appeal in *Ali*,[7] has reminded us that broadcasters are susceptible to legal action despite the existence of a public interest story, and that they need to be careful of both their tactics and their motives when balancing individual privacy with their desire to inform the public on matters of public interest. This is of particular concern when television programmes are made to make the public aware of matters of public interest and intended to be watched by millions of viewers who regard the programme as entertainment as well as educational. In such

[4] *Richard v BBC* [2018] EWHC 1837 Ch, at paragraph 292.

[5] *Richard v BBC* [2018] EWHC 1837 Ch, at paragraph 300.

[6] As is hoped to be illustrated in both *Richard* and *Ali*, considered below

[7] *Ali v Channel 5 Broadcast Ltd* [2019] EWCA Civ 677, upholding the High Court decision in *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch).

cases the broadcasters obviously consider the potential entertainment value of the programme, together with the potential viewing figures; but should that detract from the public interest value of the programme and compromise the broadcaster's public interest defence?

This article will examine the decisions in *Richard* and *Ali* to assess the implications of this approach on public interest broadcasting and the availability of the public interest defence in privacy actions. In particular, it will examine the dilemma facing the courts where a programme was made for the dual purpose of fulfilling the public interest and making 'good television' that will entertain and perhaps sensationalise the story and its telling. It will argue that although such tactics might, in some cases, exacerbate the harm caused to the claimant and thus justifiably impact on the decision, it is unfair to penalise the media simply because it intended to attract a greater audience by making 'good television' (or for the tactics employed simply to secure that result).

Specifically, it will be argued that given the hybrid status of the media – the public watchdog and the private, commercial entity - that the courts should accept the inevitability of the media's intention to engage its audience and make 'good television'. Consequently, the courts should neither give *undue* weight to the fact that the media wished to broadcast an exclusive, or more generally further its commercial and other standing, provided the public interest of the story is without question and the tactics employed by the media are otherwise proportionate to the aim of broadcasting the public interest story.[8] Tied in with this, the article will also argue that the

[8] The article will not argue that the decisions in *Richard* and *Ali* were unsustainable on their facts, but rather that the general tenor of the judgments were overly dismissive of and potentially damaging to media freedom and the public interest defence. See Steve Foster, Media Responsibility, Public Interest Broadcasting and the Judgment in *Richard v BBC'* [2016] 5 EHRLR 490, at 503. See also Thomas Bennett and Paul Wragg, 'Was Richard v

courts should be slow to interfere with broadcasting judgement when the programme is made for such dual purposes and where the harm caused to individual privacy is not otherwise disproportionate to those aims.

The article will also suggest a possible way forward in ensuring that individual privacy is protected from irresponsible and sensational broadcasting whilst retaining editorial judgement; thus ensuring that media freedom and editorial discretion is not unduly hampered. The article suggests that the propriety of media tactics (including, where relevant, their motive) is considered primarily (but not exclusively) at the first stage of the court's enquiry; in other words, whether - and to what extent - the claimant's legitimate expectation of privacy was violated. Following from that, it will argue that this factor should not be taken into account when the court is considering the strength of the public interest claim during the second stage of its enquiry, unless and in so far as the court has to revisit the strength of the privacy claim and the level of intrusion.[9] This, it will be argued, will ensure that the courts will primarily use the factor of 'good television' negatively when it has harmed the privacy interests of the claimant; and not to question or dilute what would otherwise be a strong (albeit not trump) public interest defence.

BBC correctly decided?' (2018) 23(3) Communications Law 153, at 163, and Jacob Rowbotham, 'Reporting Police Investigations, privacy rights and social stigma: Richard v BBC [2019 Journal of Media Law 115

[9] There is some conflict evident in the case law in this respect: the Court of Appeal in *Murray v* accepting that the circumstances in which and the purposes for which the information came into the hands of the of the publisher goes to the question of reasonable expectation of privacy (at para 36); and the European Court of Human Rights regarding the method of obtaining the information as part of the balancing exercise (*Springer v Germany* (2012) 55 EHRR 6 (at para 93)

Balancing press freedom and individual privacy: legitimate expectation of privacy versus the public interest in free speech

In the post- Human Right Act era, when the right to privacy comes into conflict with free speech the courts will need to strike an appropriate balance between the two rights. Section 12 of the Human Rights Act 1998 requires the courts – under s.12(1) - to have particular regard to freedom of expression where freedom of expression is threatened in legal proceedings, and - under s.12(4) - to the extent to which it is, or would be, in the public interest for the material to be published.[10] That sub-section also requires the court to have regard to any relevant privacy code. Post-Act case law has stressed that the court must consider Article 10 of the Convention in its entirety, including the exceptions permitted within Article 10(2).[11] Further, it is not appropriate for the court to give freedom of speech additional weight over and above any competing right, such as the right to private life. Thus, in *Re S (Publicity)*[12] the House of Lords confirmed that freedom of expression under Article 10 does not have an automatic 'trump' status under the Act; the judge having simply to consider the magnitude of the interference proposed and then what steps were necessary to prevent or minimise that interference.

Once the court have determined that the claimant's legitimate expectation of privacy has been interfered with, it must then establish whether any public interest in publication exists, and then decide whether that public interest justifies the publication or broadcast, including the privacy

[10] For a comprehensive coverage of this area, see Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* OUP 2006, Part IV.

[11] *Douglas* v *Hello! Magazine* [2001] 2 WLR 992.

[12] [2005] 1 AC 593.

harm it has caused.[13] In *Richard v BBC*, Mann J listed the criteria that is used in conducting that balancing exercise and coming to a conclusion where on the facts the balance lies. These included: any contribution to a debate of general interest; how well known the person concerned is and what is the subject of the report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed.[14] He also noted that in addition to those matters, s.12(4) requires the court to have regard to any relevant privacy code: in the present case it the BBC's editorial guidelines.[15] The weight given to these factors is obviously case-sensitive, and with respect to the media, dependent on the court's view of the public interest value of the story, including whether, and how, that story been pursued by the media.

This article does not argue for the widening of the public interest defence in privacy cases. Nor does it question the current distinction between what is in the public interest and what the public are interested in.[16] Rather, it implores the courts to take a more positive approach to the defence where the programmes seeks to entertain as well as inform. It also argues that the courts should recognise that such programmes could serve a public interest, despite the intention to entertain and create 'good television'.

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[13] See Kirsty Hughes, 'The public figure doctrine and the right to privacy' [2019] 78(1) CLJ 70, where it is argued that at the second stage the courts should consider the factor of whether the publication contributed to a matter of public interest, to the exclusion of whether the claimant is or is not a public figure.

[14] *Richard v BBC* [2018] EWHC 1837 Ch, at paragraph 276

[15] *Richard v BBC* [2018] EWHC 1837 Ch, at paragraph 277

[16] Previous articles have argued for such a widening, and have doubted the approach taken by the domestic courts to the public interest defence. See Paul Wragg 'The benefits of privacy-invading expression' [2013] 64(2) Northern Ireland Quarterly Review 187, and Steve Foster 'Media Responsibility, Public Interest Broadcasting and the Judgment in *Richard v BBC'* [2016] 5 EHRLR 490.

In general, the public interest defence is activated when the matter under discussion is a matter of genuine public interest or debate, thus serving a public and democratic purpose.[17] Wragg has highlighted that there are three broad, but distinct, interpretations of the term public interest at work.[18] They are: that the public have the right not to be misled;[19] that, as role models, public figures must adhere to a higher standard of behaviour;[20] and that the media enjoys a general freedom to criticise the behaviour of others.[21] He also argues that there is a more general public interest at play in most cases of privacy-invading expression, beyond asking whether the expression furthers the democratic process. This 'benefits-to-self' justification is based on the idea that by learning of another's private actions the reader gains a deeper insight of how to behave in society and what to expect of others. Furthermore, the audience might modify their behaviour in respect of the well-known figure public publically – by for example by not supporting that person, or criticising them in private with friends.[22]

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[17] In *Van Hannover v Germany* (2005) 40 EHRR 1. the European Court stated that: '...a fundamental distinction needs to be made between reporting facts – even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their public functions, for example, and reporting details of the private life of an individual who ... does not exercise official functions' (at paragraph 63)

[18] Paul Wragg 'The benefits of privacy-invading expression' [2013] 64(2) Northern Ireland Quarterly Review 187, at 195.

[19] As seen in *Campbell v MGN Ltd* [2004] 2 AC 457; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) *and McLaren v MGN Ltd* [2012] EWHC 2466 (QB)

[20] See *Ferdinand* and *McLaren*, above note 17

[21] *Terry (Previously LNS) v Persons Unknown* [2010] EMLR 16

[22] Paul Wragg 'The benefits of privacy-invading expression' [2013] 64(2) Northern Ireland Quarterly Review 187, at 196. Wragg also explores the benefits of encouraging autonomous free speech rights, but this article will not pursue those arguments on behalf of specific journalist, editors or broadcasters.

In *Richard* and *Ali* there was at least a potential public interest in investigating, respectively, crime prevention and the issues of debt in modern society. Accordingly, there was a benefit to the public in being informed of such events. Further, in *Richard* there was an argument that the broadcast assisted in correcting previous impressions of his image. Those public interest defences may have failed for other reasons, but it is clear from those decisions that the courts may dilute the legitimacy and extent of that defence because of the tactics employed by the media, and/or its motive in broadcasting the story as it did.[23] This will of course affect the balancing exercise by diluting the weight of the defence, and in certain cases robbing the media of the defence altogether. More specifically, judicial questioning of the tactics employed by the media will interfere with the latter's editorial judgement, and excites discussion as to whether such interference is acceptable.

Editorial judgement and the balance between media freedom and individual privacy

It is now quite clear that the editorial judgement of the media is not beyond enquiry when the courts conduct its balance between individual privacy and freedom of expression and press freedom. Thus, the media cannot rely exclusively on the public interest character and quality of the story to rebut the claimant's legitimate expectation of privacy.[24] At both stages the courts

[23] This reason, as we shall see, might not be the sole reason why the public interest defence was rejected or outweighed by the privacy claim.

[24] In particular, see *Campbell v MGN Ltd* [2004] 2 AC 457; *Ali v Channel 5 Broadcast Ltd* [2019] EWCA Civ 677; and *Richard v BBC* [2018] EWHC 1837 Ch.

can be influenced by the tactics employed by the media both in researching the story (in other words in enquiring why the programme was made and the lengths the media was prepared to go in gathering that information); and in presenting it (in other words how the substance of that story is presented). Consideration of the latter consideration (the presentation) follows from the courts' acceptance that the broadcasting and publication of stories by the media is capable of causing greater harm to individual privacy than the dissemination and discussion of such information by private individuals on social media.[25] Consequently, in the context of defending privacy claims, the media have greater responsibilities in ensuring that it does not infringe individual privacy, and the courts will subject the media to greater scrutiny in this regard; which will be duly reflected in the courts' balancing exercise. This is despite recognition by the European Court of Human Rights that the media should have greater discretion, and in some cases, immunity, when reporting on matters of public interest.[26] Nevertheless, as will be argued later, there is less justification for penalising the media with respect to the first consideration (the technique of gathering information and the motive for which it is carried out), and little if no justification for penalising the media solely for its intention to make 'good television'.[27]

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[25] See for example *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), where an injunction and anonymity order were continued despite the claimant's identity and revelations of his sexual life being posted on social media. See also *PJS v News Group Newspapers Ltd* [2016] AC 1081, where the Supreme Court upheld an injunction to prohibit details of the claimant's sexual life despite the claimant's identity and details of their sexual affairs being available on social media.

[26] *Sunday Times v United Kingdom* (1979-1980) 2 EHRR 245 *Reynolds v Times Newspapers* [1999] 4 All ER 609, *and Turkington v Times Newspapers* [2001] 2 AC 77.

[27] In some cases, however the story's outcome and harm will be a direct product of the tactics employed by the media, in which case it is accepted that the harm caused by those tactics are of relevance to the extent they represent an unreasonable intrusion into privacy.

Outside the context of television broadcasting, there is evidence that the domestic courts will provide the media with a good deal of editorial judgement, and be tolerant of heavy-handed tactics, provided they are satisfied of the public interest value of the story. In these cases, the court is prepared to tolerate what would otherwise be clear invasions of privacy by sensational reporting if there is a sufficiently strong public interest in covering the story, particularly if the claimant is a public figure.[28] Nevertheless, the media, and indeed other bodies, may have to pay for irresponsible broadcasting or press tactics in appropriate cases, where the public interest defence is clearly not strong enough in justifying the courts' tolerance. This is clearly illustrated in *Peck v United Kingdom*,[29] a case primarily concerned with a local authority's misuse of private information and images. but which can still be used as an example of the standards and proportionality of propriety of media tactics expected when broadcasting public interest stories. This decision exposed the deficiencies of the domestic law of privacy and in the post-Human Rights Act era has (indirectly) strengthened the protection of individual privacy when the courts are balancing it with press freedom and other interests.

In this case, Geoffrey Peck, who was suffering from depression, was walking down Brentwood High Street with a kitchen knife in his hand when he attempted to commit suicide by slitting his wrists. Unbeknown to him he was filmed by closed-circuit television, although the footage did not show him cutting his wrists. Two months later, the Council issued a press feature in their CCTV News, containing two photographs from the footage along with an account of the

[28] *See AAA v Associated Newspapers* [2013] EWCA Civ. 554 *and Trimingham v Associated Newspapers* [2012] EWCH 1269 (QB), where the courts tolerated the newspapers' tactics in revealing and commenting on the extra marital affairs of politicians.

[29] (2003) 36 EHRR 41; decision of the European Court of Human Rights, 28 January 2002

incident,[30] and three days after that a local newspaper used a photograph of the incident on a front-page article about the operation of the closed circuit television system. In both cases, his face had not been specifically masked. The next day an article entitled 'Gotcha' appeared in another, local newspaper, with a circulation of approximately 24,000, containing a photograph from the footage and describing how the police had defused a potentially dangerous affair. A follow-up article was published three days later, using the same photograph.[31] The footage was then supplied to the producers of the BBC programme 'Crime Beat', which had on average 9 million viewers. Although the Council imposed a number of conditions relating to its showing, including that no one should be identifiable and that all faces should be masked, the applicant's face was not masked in trailers for the programme.[32]

The applicant then made a number of television appearances to complain about the situation and complained to the Broadcasting Standards Commission regarding the programme on the BBC, alleging an unwarranted infringement of his privacy. The Commission upheld his complaints and his complaint to the Independent Television Commission concerning the Anglia television programme was upheld because his face had not been properly obscured.[33]. The applicant's complaint to the Press Complaints Commission regarding the article in the "Yellow Advertiser" was dismissed, on the basis that the incidents had taken place in a public

[30] The applicant's face was not specifically masked and the article explained that the applicant had been spotted with a knife in his hand and that he was clearly unhappy but not looking for trouble.

[31] Evidence suggested that a number of people recognised the applicant, and one day after the publication of the last article, Anglia Television broadcast a programme to approximately 350,000 people containing extracts of the footage although the applicant's face had been masked at the Council's request.

[32] Despite the producers assuring the Council that his face was masked in the main programme, several of his friends and family recognised him from the programme.

[33] As a result of the finding, an apology was given by Anglia TV

place and no criminal stigma had been attached to the applicant. An application for judicial review of the Council's decision to release the footage was also unsuccessful,[34] and he applied to the European Court of Human Right, relying on Article 8 ECHR, and claiming that the disclosure of the footage was an unjustified interference with his right to private life.

The European Court found that the disclosure of the footage by the Council had resulted in a serious interference with the applicant's right to respect for private life. It then noted that disclosure of such private intimate information could only be justified by an overriding requirement in the public interest, and that the disclosure of such information without the consent of the individual called for the most careful scrutiny.[35] In the Court's view, the aims of the coverage and its release did not justify the direct disclosure by the Council to the public of stills of the applicant in "CCTV News" without it obtaining the applicant's consent or masking his identity. Neither could it justify its disclosure to the media without it taking steps to ensure so far as possible that his identity would be masked.[36]

The decision in *Peck* did much to alert the United Kingdom of the shortcomings of the domestic law on privacy, but also provided a useful benchmark with respect to inappropriate and irresponsible media techniques that might not pass muster with the European Court, and which

[34] *R v Brentwood Council, ex parte Peck* [1998] CMLR 697. The High Court found that the Council had an implied legal power to release such information to other bodies when that was necessary to fulfil its statutory power to operate the scheme, and that the Council had not acted irrationally in conveying this particular information to the relevant bodies in the manner that it did.

[35] *Z v Finland* (1997) 25 EHRR 371.

[36] Further, the disclosure of the material in CCTV News and to the local newspaper, Anglia Television and the BBC, were not accompanied by sufficient safeguards and, thus, constituted a disproportionate and unjustified interference with the applicant's private life.

were then employed by the domestic courts in the post-Human Rights Act era.[37] However, it is the *extent* to which the courts (both European and domestic), are prepared to interfere with editorial judgement and media tactics that determine the success or failure of press freedom cases in privacy claims, and which is of interest to the debate surrounding media judgement and the effect of editorial tactics on the public interest defence.

The early case law under the Human Rights Act indicated that the courts would be reluctant to interfere with the editorial judgement of the press in respect of how they present the story. Thus, in *Av B plc*,[38] Lord Woolf LJ stated that:

> 'Once it is accepted that the freedom of the press should prevail, then the form of reporting in the press is not a matter for the courts but for the Press Complaints Commission and the customers of the newspaper concerned.'[39]

That case has since been discredited on other grounds[40] and the above dicta certainly does not represent the current approach of either the European or domestic courts in terms of both the legitimate expectation of privacy, and the scope and application of the public interest defence.[41] Nevertheless, there is evidence that the domestic courts will provide the media with a great

[37] See for example, *Campbell v MGN Ltd* [2004] 2 AC 457, and *Mosely v News Group Newspapers* [2008] EMLR 20.

[38] *A v B plc* [2003] QB 93.

[39] [2003] QB 93, at para 48

[40] In other words, that sexual activity outside marriage or a permanent relationship do not enjoy any significant expectation of privacy.

[41] See the decisions in *McKennitt v Ash* [2007] 3 WLR 194, and *Campbell v MGN Ltd* [2004] 2 AC 247.

deal of editorial judgement, and be tolerant of heavy-handed tactics, provided they are satisfied of the public interest value of the story.[42] Equally, Lord Woolf's opinion would only hold *if* it were accepted that freedom of the press should prevail, and it is now quite clear that the mere presence of a public interest in the story does not automatically trump the legitimate expectations of privacy of the claimant.[43] Accordingly, in *Campbell v MGN Ltd*, [44] Lord Hope stated that the tactics employed by the press were no longer a matter of pure editorial policy, but now had to be viewed in the context of infringement of privacy:

> '…..The choice of language used to convey information and ideas, and decisions as to whether or not to accompany the printed word by the use of photographs, are pre-eminently editorial matters with which the court will not interfere. The respondents are also entitled to claim that they should be accorded a reasonable margin of appreciation in taking decisions as to what details needed to be included in the article to give it credibility. This is an essential part of the journalistic exercise.
>
> But decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing. Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life…Any restriction of the right to

[42] *See AAA v Associated Newspapers* [2013] EWCA Civ. 554 *and Trimingham v Associated Newspapers* [2012] EWCH 1269 (QB), where the courts tolerated the newspapers' tactics in revealing and commenting on the extra marital affairs of politicians.

[43] The media will, therefore, have to satisfy the more exacting tests laid down in *Campbell* and *McKennitt*, which gave greater protection to individual privacy.

[44] [2004] 2 AC 457

> freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life.'[45]

This reflects the change in jurisprudence in privacy and press freedom cases at the domestic level,[46] as well as the need to ensure that individual privacy is adequately protected against media intrusion in accordance with the principles laid down by the European Court of Human Rights.[47] The courts have to balance both rights by looking at the respective strength of each claim, the level of interference with each right, and by employing proportionality so that freedom of expression is not given trump status.[48] Nevertheless, there is a difference between accommodating responsible journalism and broadcasting in assessing the harm caused to the individual's privacy - and indeed reflecting that in the strength of the countervailing public interest defence - and penalising the media (at either stage) because they pursued a public interest story for their own gain, or to entertain its audience. The latter motives, it is argued, are the inevitable consequences of media activity and should not tell against the media unless they have acted in bad faith, or have otherwise employed a tactic that causes greater harm to the victim than is appropriate in the circumstances.

Despite the desire to protect individual privacy, the courts have stressed the importance of editorial judgement and cautioned against interference in cases where the story is written (or broadcast) on a matter of public interest. Thus, in *Axel Springer v Germany*,[49] the European

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[45] *Campbell v MGN Ltd* [2004] 2 AC 457, at paras 112-113.

[46] *Campbell v MGN Ltd*, above and *McKennit v Ash* [2006] EMLR 10, upheld on appeal [2007] 3 WLR 194

[47] Most notably, those principles established in the case of *Von Hannover v Germany* (2006) 43 EHRR 7

[48] *Re S (Publicity*) [2005] 1 AC 593.

[49] (2012) 55 EHRR 6

Court stressed that it was not 'for the court…to substitute its own views for those of the press as to what techniques should be adopted.'[50] Again, in *Jersild v Austria*,[51] the European Court noted that:

> '…it was not for this Court, *nor for the national courts, for that matter*, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the court recalls that article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.''[52] (italics added)

Further, at the domestic level, in *Campbell v MGN Ltd*,[53] Lord Hoffmann stated that it would be 'inconsistent with the approach that has been taken by the courts in a number of recent landmark decisions for a newspaper to be held strictly liable for what a judge considers to have been necessary. In his Lordship's view, editorial decisions have to be made quickly and with less information than is available to a court, which afterwards reviews the matter at leisure.[54] Earlier in his judgment, Lord Hoffmann stressed that judges are not newspaper editors, and that

[50] (2012) 55 EHRR 6, at para 81

[51] *Jersild v Denmark* (1994) 19 EHRR 1.

[52] (1994) 19 EHRR 1, at para 31. See also *Fressoz v France* (2001) 31 EHRR 28, at para 54, where the Court stressed that Article 10 leaves it for journalists to decide whether or not it is necessary to produce material to reproduce material

[53] [2004] 2 AC 457.

[54] [2004] 2 AC 457.at para 62

it is harsh to criticise an editor for ‘‘painting a somewhat fuller picture in order to show the claimant in a sympathetic light.’’[55]

Returning to the decision in *Peck*, although the litigation centered round the local authority’s actions, the tactics employed by both the newspapers and the television in that case were wholly unsympathetic and dismissive of individual privacy. Whether their intention was to make good television, those tactics caused identifiable harm to the victim and should be considered by the courts in assessing any breach of privacy and the application of the public interest defence. The same could be said of the tactics employed in both *Richard* and *Ali*, considered below: the BBC and Channel 5 decided to employ certain tactics in broadcasting the public interest story; and the courts, arguably quite justifiably, decided that those tactics intruded disproportionally with the claimants’ privacy.

Editorial judgement and the tactics employed by the media are indeed capable of affecting the strength of the claimant’s privacy claim, and can be considered as a factor in the balancing exercise alongside the strength of the public interest story and the professional conduct of the media. Thus, once the court has found that the tactics have seriously infringed the claimant’s privacy, *that* invasion can only be justified if there is a sufficiently strong public interest in broadcasting that information. Yet what is unacceptable and potentially damaging to media freedom is if the media is expected to devote their story entirely to the public interest, and not to consider whether the story will entertain or make ‘good television’. The next section of the

[55] [2004] 2 AC 457, at para 59. Note, in this case, Lord Hofmann appears to be persuaded that the photographs of the claimant were used in order to put her in a sympathetic light and thus to highlight her personal plight; rather than to expose her behaviour, or humiliate her.

article considers this argument, specifically in the context of the recent decisions in *Richard* and *Ali*, in order to assess the potential dangers of this trend to penalise the media.

Making 'good television' and losing the public interest defence

This section of the article examines the case where the public interest in the broadcast is not in doubt, but where the court rejects, or substantially reduces that interest because it feels that the broadcaster's intention was to make 'good television' rather than serve the public interest. This section will not argue that the media should not be subject to any interference with its editorial judgement or be subject to principles of good broadcasting. Rather, it argues that the motive to make 'good television' is inevitable when the media decide to make a programme, even on a matter of genuine and serious public interest, and that that fact alone should not unduly reduce the public interest defence.

Before we examine the arguments and the relevant case law, it is worth highlighting two dilemmas inherent in controlling the activities of the media. First, the media have an undoubted public role to play as public watchdog and as a conduit between news items and the public,[56] but at the same time are private bodies with private interests. This dilemma is neatly summed up by Lord Donaldson MR:

> 'The "Media"… are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the

[56] This has been accepted in particular in the law of defamation: see the decision of the House of Lords in *Turkington v Times Newspapers* [2001] 2 AC 277.

> views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always.[57]

It is, of course, the reaction of the judiciary to that dilemma, and its attitude towards the media's proper role in a democracy, that will determine the success of any public interest defence in the overall balancing exercise. Thus, if the courts start from the premise that the media is in essence a public body, there to serve the general public interest and to comply with strict standards on how they collate and disseminate information to the public, then the basic tenets of media freedom may be lost.[58] This role is not performed as a formal public body and as an arm of the state, but as a watchdog of the public interest, albeit operating in the private sphere, and with a duty to follow the rules of professional broadcasting in order to respect individual privacy interests to an appropriate degree.[59]

Secondly, and related to the first (general) dilemma, most, although not all, media organisations are involved in both informing and 'entertaining' its audience. If news items were presented purely as fact and as a vehicle for academic or other reflection, the media, and in particular the broadcasting industry, would not function in either of its capacities. In the vast majority of cases, broadcasters and newspapers are not producing programmes and articles for pure academic or intellectual interest – as might a law journal, or other publications such as *The*

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[57] *Francome v Daily Mirror Group Newspapers* [1984] 1 WLR 892, at 898

[58] See Steve Foster, 'Media Responsibility, Public Interest Broadcasting and the Judgment in *Richard v BBC'* [2016] 5 EHRLR 490, at 491

[59] *Ibid*. Hence, in the Cliff Richard case the BBC should have fulfilled its duty by continuing to collaborate with the police and refusing to carry out its own investigations and broadcast.

Economist. They produce news and stories both to inform and entertain (or at least to engage the audience beyond the mere dissemination of objective facts), and in the context of a competitive market and the need to serve the public desire to be engaged and of the broadcaster or publisher to sell their product.

On the other hand, editorial judgement and motive need to be checked. Individuals such as the claimants in the *Richard* and *Ali* cases are not willing participants in the stories, unlike participants in many reality shows; and in *Ali* we were dealing with wholly private individuals.[60] Programmes exposing certain individuals for their criminal or anti-social behaviour are watched and enjoyed by millions of viewers: all under the justification of the public benefit in exposing such individuals. These programmes and indeed all public interest stories are produced knowing that they will have an entertainment value: whether it is the satisfaction in seeing a public figure getting their comeuppance, or, more cruelly, witnessing private individuals carrying out embarrassing acts. Obviously, these programmes and stories cannot be broadcast irrespective of the harm or embarrassment caused to that individual. Such individuals have redress in appropriate cases and may bring claims based on breach of privacy.[61] In these cases, the court has to balance two competing rights (privacy and free speech), and a key factor in determining whether any interference with privacy is proportionate and necessary on the facts is the extent to which the broadcast or other public dissemination serves the public interest. However, is it right that the public interest defence is compromised if it can be shown that the programme was intended to become 'good television'?

[60] The court rejected the claim that one of the tenants was a public figure because he had been involved in local politics.

[61] *Campbell v MGN Ltd* [2004] 2 AC 457. This case established the action of misuse of private information, developed from the common law action in confidentiality.

The danger of making 'good television' and the decision in *Richard v BBC*

The impact on privacy claims and the strength of a public interest defence when a court accepts that a programme was made to create 'good television' is clearly illustrated in the High Court decision in *Richard v BBC*.[62] In that case, the claimant, Sir Cliff Richard, claimed damages for breach of his right to privacy against the first defendant BBC when it had revealed that he was being investigated for sex offences, and produced numerous broadcasts of the police search; including the use of helicopters to catch images of the claimant's property. The High Court had to determine whether the claimant had a legitimate expectation of privacy, and whether any interference with that right was justified by the BBC's right to freedom of expression, together with any damages payable by it.

The facts and background to the case were particularly relevant to the final ruling,[63] having an undoubted influence on the judge's approach to both the privacy issue and the availability of the public interest defence. A BBC journalist had discovered from a confidential source – believed to be someone from the police force that was aware of the police investigation - that the police force was investigating the claimant in respect of an allegation of historical sex abuse.[64] Subsequently, the police had agreed to give the journalist advance notice of a search of the claimant's English property, and the BBC then revealed that the claimant was being

[62] [2018] EWHC 1837 (Ch)

[63] The full facts and analysis of the witness statement are detailed in paragraphs 1-148 of the transcript

[64] The investigation was part of 'Operation Yewtree' into historical sex abuse.

investigated and produced numerous broadcasts of the search; including the use of helicopters to catch images of the claimant's property.[65] The police investigation continued for two years, but the claimant was never arrested or charged.[66]

Giving judgment on whether the claimant had a reasonable expectation of privacy in respect of the matters relating to the police investigation, Mann J, cited Sir Anthony Clarke's dicta in *Murray v Express Newspapers plc,*[67] where he formulated the matters that should be taken into account in deciding whether the claimant had a reasonable expectation of privacy. Having done so the judge felt that the last two factors - the effect of the publication on the claimant, and the circumstances in which, and the purposes for which the information came into the hands of the publisher[68] - were capable of being very relevant to the present case.[69] This reflected the judge's disapproval of the BBC's tactics, both in the manner in which they gathered the information and in the way in which the programme was broadcasted, including what was broadcast.

Whilst it is not argued that the judge was entitled to consider those factors at the first, and indeed the second stage, it is argued that the judge's disquiet of the BBC's tactics and the belief that BBC had reported the story to make 'good television' may have led to a distortion in the balancing act. Thus, with respect to the balancing exercise between the claimant's Article 8

[65] [2018] EWHC 1837 (Ch.), at paragraph 224. In his summary of the facts, Mann J concluded that that the journalist had misled the police force and the media personnel into believing that the journalist knew more of the operation than he actually did. Further, he had impliedly threatened the force that if they did not confirm the allegation and proffer further information he would reveal the story before the planned arrest.

[66] Eventually the police admitted liability and agreed to pay £400,000 in damages to the claimant.

[67] [2009] Ch. 481

[68] *Murray v Express Newspapers plc* [2009] Ch. 481, at paragraph 36

[69] *Richard v BBC* [2018] EWHC 1837 (Ch), at paragraph 231.

rights and those of the BBC under Article 10 of the Convention,[70] the judge was clearly critical of the way in which the BBC had acquired the information.[71] These factors, in the judge's view, clearly weakened the BBC's position;[72] in the judge's view, the impact of the invasion was materially increased by the nature of the BBC's coverage, which had added drama and a degree of sensationalism.[73] Thus, the judge concluded that the BBC went in for an invasion of Sir Cliff's privacy in a big way,[74] and in assessing the question of whether the story contributed to a debate of public interest, the judge stated that:

[70] The European Court of Human Rights in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 stated that its role was not to balance freedom of expression with countervailing interests, but rather to uphold freedom of expression subject to narrowly construed exceptions. However, it is now accepted that when it is pitted against another fundamental human right, the courts must balance the two rights equally, employing proportionality to decide which right takes precedence on the facts. This is reflected in domestic case law: *Re S (Publicity)* [2005] 1 AC 593.

[71] That is, through a source who was clearly acting wrongfully, and of the veiled threat they had made to the police that they would release the story themselves if not provided with the necessary information. Thus the judge noted that it was very significant that the publication started with obviously private and sensitive information, obtained from someone who, to the BBC journalist's knowledge, ought not to have revealed it, and confirmed or bolstered with a ploy in the form of a perceived threat by the journalist to the police that ought not to have been made, namely that he would publish the story before the police search: *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch), at paragraph 293

[72] [2018] EWHC 1837 (Ch), at paragraph 292.

[73] [2018] EWHC 1837 (Ch), at paragraph 300.

[74] [2018] EWHC 1837 (Ch), at paragraph 301.

> ‘For what it is worth, I do not believe that this justification was much in the minds of those at the BBC at the time. I think that they, or most of them, were far more impressed by the size of the story and that they had the opportunity to scoop their rivals.[75]

Further, in deciding that the BBC did not quite comply with the ethical requirements of its journalism at that stage, the judge suggests that the real reason for that was that it was giving a lot of weight, in its own deliberations, to preserving the exclusivity of its own scoop:

> ‘The material at trial demonstrated not only that people were very excited at the prospect of this scoop, but also that they were very keen to preserve it as their own. I emphasise that I am not finding that there is anything inherently wrong with a desire to beat a rival to a story. What happened in this case was that that view unduly skewed other judgements that had to be made.’[76]

Finally, the judge noted that the facts of the narrative were presented with a significant degree of breathless sensationalism:

> ‘There was an attempt to lend drama to the broadcast by showing cars entering the property, and the helicopter shots added more, somewhat false, drama. It may have made for more entertaining and attention-grabbing journalism. It may be justifiable or explicable on the footing that TV is a visual medium and pictures are part of what it does…but I still consider that the main purpose of utilising the helicopter was to add

[75] [2018] EWHC 1837 (Ch), at paragraph 280

[76] [2018] EWHC 1837 (Ch), at paragraph 295

> sensationalism and emphasis to the scoop of which the BBC was so proud. The BBC viewed this as a big story, and presented it in a big way.[77]'

It has been argued previously that the judge's reaction to the tactics employed by the BBC led to him ignoring the public interest element of the broadcast and downgrading the fact that the investigation concerned matters which were part of an undoubted and serious public debate.[78] For the purposes of the present article, it is accepted that it was valid to consider the BBC's tactics in gathering the information - and what it chose to show - in assessing the proportionality of the media's invasion into individual privacy. Mann J's judgment in *Richard* justifiably relies heavily on the tactics employed by the BBC in the both the gathering of the information and the subsequent dissemination of the news item. Thus, the author accepts that it is appropriate to consider whether a public interest story and defence should be affected by what the court regards as irresponsible journalism. However, what may be of concern is that the court could regard a tactic as irresponsible simply because of its motive: that it was executed in order to steal a march on competitors, or to make entertaining and 'good television'. Such a finding may be predicated on the assumption that it is wrong for the media to make and broadcast programmes for that reason. Thus, the decision in *Richard* is probably sound on its facts: the public interest in the story did not justify *that level* of intrusion and the intensity of the tactics. Nevertheless, the tenor of the ruling might indicate that, in general, the media may lose its public interest defence whenever the main, or substantial, motive is to make good television. In other words, that the clear public interest in a story might be negated because the media's

[77] [2018] EWHC 1837 (Ch), at paragraph 300-301

[78] Steve Foster, 'Media Responsibility, Public Interest Broadcasting and the Judgment in *Richard v BBC'* [2016] 5 EHRLR 490, at 499-500

desire was to gain commercially or to sensationalise, rather than inform. Such motives, it is argued, are an inevitable element of making programmes, and unless that has disproportionately affected the privacy interests of the claimant, should not inform the court's balancing process.[79] Equally, to berate the media for revelling in its own investigative activities, and to guard the exclusivity of such stories, is, it is submitted, unrealistic and damaging where such investigations concern such high matters of public interest, such as a bona fide investigation into sex crimes.

The danger of making 'good' television and the decision in *Ali*

The decision in *Richard* was followed most recently by the Court of Appeal in *Ali v Channel 5*,[80] a case concerning the public broadcasting on television of a family's eviction from their home. The High Court decision in that case,[81] with which the Court of Appeal agreed, was decided before *Richard*, but in any case, both courts used the fact that programme makers had made 'good' and sensational television at the expense of individual privacy in upholding the claim, thus possibly diluting the strength of the broadcaster's public interest defence.

[79] More generally, it is argued that the courts should not use breaches of professional journalism as the focal point of their decision. This was made clear in *Jameel v Wall Street Journal Europe* [2007] 1 AC 359, a defamation case on whether the public interest defence should be available to the press. In that case, the House of Lords held that the ultimate question must be whether publication was in the public interest, and not whether the media have broken the rules of professional journalism; their Lordships stressing that the standard of conduct needed to be applied by a newspaper needed to be applied in a practical and flexible manner.

[80] [2019] EWCA Civ.677

[81] [2018] EWHC 298 (Ch)

In this case, the claimants brought an action for damages against the defendant television production company for misuse of their private information. Due to rent arrears, the landlord obtained a High Court writ of possession against the claimant and when enforcement officers attended the property to evict the claimants they were accompanied by the defendant's film crew; the landlord's father also attended. The first claimant, who was the voluntary media secretary of a Muslim political party, was awoken as they entered the property and was given an hour to vacate. The second claimant returned after taking her children to school. Various exchanges took place during the hour, but shortly before they vacated the first claimant agreed to be interviewed. Subsequently, the landlord's father posted two videos he had recorded of the eviction on social media. The defendant then broadcast edited footage as part of a series of programmes called "Can't Pay? We'll take it away". The programme containing the claimants was seen by 9.65 million viewers and the claimants' daughter suffered bullying at school as a result of the broadcast. The claimants accepted that the writ was a public court order and that the defendant was entitled to broadcast the fact that they had been evicted. However, they contended that as the programme included filming of them in their home, in distress and being taunted by the landlord's father, it was in breach of their right to respect for private and family life. In response, the defendant argued that the programme addressed matters of real public concern, namely the public reporting of increased levels of debt, dependence on housing benefit and the effect of enforcement of writs of possession by High Court enforcement officers.

In the High Court, judgment was given in favour of the claimants. After finding that the claimants had a reasonable expectation of privacy in respect of the information,[82] the Court proceeded to balance the claimant's article 8 rights with the defendant's rights under article 10.

[82] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), at paragraphs 145, 158, 162-163, 169.

Although it accepted that the programme contributed to a debate of general interest, it found that the inclusion of the claimant's private information went beyond what was justified for that purpose.[83] In the Court's view, the programme's focus was not on the matters of public interest, but on the drama of the conflict between the claimants and the landlord's father. Further, that conflict had been encouraged by one of the enforcement officers to 'make good television,'[84] – the officer saying to the landlord, 'say whatever you like, just give it some wellie, you know it makes good television.'[85]

The judge concluded that the claimants had not established that the programme was unfair or inaccurate, and the defendant had editorial discretion as to the way in which it told the story. However, in his view that discretion did not extend to its decision to include the private information of which the claimants' complained unless it was justified as contributing to a debate of general interest.[86] On the facts, therefore, the balance came down in favour of protecting the claimants' article 8 rights and the defendant had failed to convince the court that this intrusion was justified and proportionate.[87]

As with the decision in *Richard*, the High Court was prepared to interfere with editorial discretion if it unjustifiably interfered with individual privacy, and to reduce the weight of the public interest defence if the focus of the programme was the relaying of the drama of the event. Before the Court of Appeal, the broadcasters submitted that the judge had interfered

[83] [2018] EWHC 298 (Ch), at paragraph 210.

[84] [2018] EWHC 298 (Ch), at paragraph 120

[85] As the Court of Appeal noted, the intentions of the officers to make good television should have been apparent to the film crew and the editorial team: [2019] EWCA Civ. 677, at para 57.

[86] [2018] EWHC 298 (Ch),at paragraph 120

[87] [2018] EWHC 298 (Ch), at paragraph 120

with the legitimate exercise of editorial discretion in balancing the respective rights under Articles 8 and 10 of the Convention, and had taken too narrow a view of what was in the public interest. With respect to editorial discretion, the Court of Appeal noted that the preponderance of authority from *Campbell v Mirror Group Newspapers Ltd*[88] through to *Richard v BBC*,[89] established that editorial discretion could not render lawful an interference with privacy that could not rationally be justified by reference to any public interest served by publication.[90] Further, the Court of Appeal stressed that where there was a rational view by which the public interest could justify publication, particularly giving full weight to editorial knowledge and discretion, then the court should be slow to interfere.[91]

In the present case, in the Court of Appeal's view it was clear that the issues underlying the programme were of real public interest and extended well beyond the specifics of the High Court process.[92] There was a proper general public interest in the whole human story of debt, eviction and the consequences on families, and it was hard to see how those matters could be illustrated in any documentary without interfering with the privacy of those most affected.[93] On the other hand, although lack of good faith had not been alleged, it seemed clear that the agent had an eye to the impact on "good television" and might have encouraged the landlord

[88] [2004] UKHL 2

[89] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 1837 (Ch)

[90] *Ali v Channel 5 Broadcast Ltd* [2019] EWCA Civ 677, at paragraph 83

[91] [2019] EWCA Civ 677, at paragraph 83

[92] [2019] EWCA Civ 677, at paragraph 84

[93] [2019] EWCA Civ 677, at paragraph 84

accordingly.[94] The Court of Appeal upheld the decision of the judge at first instance despite reservations of how he had dealt with the public interest defence in general, and editorial discretion in particular. Thus, Lord Justice Irwin noted that popular documentary television was an accepted form and that those instrumental in the broadcast disavowed any bias or skewed presentation. Further, the narrative contained the account of both parties, at least to some degree.[95] His Lordship then stated that the court had some reservations about the judge's treatment of the public interest defence. These reservations included that his approach to the public interest issues was too narrow; that he had failed to place on the scales the other matters of public interest in the programme and, more broadly in the series as a whole; and that he had made inadequate allowance for the exercise of editorial discretion.[96] Yet despite these reservations, the Court of Appeal upheld the decision because the judge was aware of the relevant legal principles, and, in particular, with the warning that a court should be slow to interfere with editorial discretion,[97] and had on the facts attached weight to a range of public interest issues.[98]

As will be argued below, the courts' recognition that the broadcasters had ensured that the recording of the incident made ''good television'' - thus reducing the weight of the genuine public interest in making and broadcasting the programme - could lead to an unjustified interference with media freedom and editorial discretion. In the context of television programmes such as the one in *Ali*, it is inevitable that the programme is being made for both

[94] [2019] EWCA Civ 677, at para 86. The Court also noticed that there had also been an absence of true consent on the part of the appellants.

[95] [2019] EWCA Civ 677, at paragraph 89

[96] [2019] EWCA Civ 677, at paragraph 90

[97] [2019] EWCA Civ 677, at paragraph 92

[98] *Ali v Channel 5 Broadcast Ltd* [2019] EWCA Civ 677, at paragraph 93

informative and entertainment purposes. Although such tactics can impact (further) on individual privacy, the public interest features of the programme should not be dismissed solely because of the tactics employed by the broadcasters. In particular, those features should not be dismissed (or substantially diminished) solely because the broadcaster's intention was to make a more entertaining programme – 'good television'. The Court of Appeal's approach in this case - that the appeal court should not interfere with the judge's ruling unless satisfied that it did not represent a reasonable view of the evidence,[99] does little to address the complex and delicate issue of editorial discretion and the courts' role in monitoring any interference with it. More specifically, it does not address the question of whether and to what extent courts such have regard to the media's intention in creating 'good television' when conducting the overall balance between privacy and media freedom. On the facts, the broadcast, including the broadcaster's tactics, may have unreasonably interfered with the claimant's privacy, particularly as the 'victims' were private individuals and family members. However, to confirm that decision by relying on the factor of 'good television' is both inappropriate and damaging to media freedom, particularly where the appeal court had reservation about the trial judge's approach to the public interest issues.

Overall reflections on editorial discretion and the need to avoid making 'good television'

The dilemma that we face in these cases is that individuals may need protection from the effects of sensational and unprofessional tactics employed by the media in reporting public interest stories. This is because both domestic and European case law recognise that investigative

[99] [2019] EWCA Civ 677, at paragraph 94

journalism can cause harm to individual privacy, and that excessive coverage or tactics can cause further harm.[100] On the other hand, the law must ensure that the media are free to report such stories within their own editorial discretion. More specifically, we face the dilemma of whether to penalise the media, perhaps at both stages of the enquiry, when it indulges in what the courts regard as sensational tactics in order to make 'good television.' This section of the article provides a possible compromise by suggesting that the factor of sensational tactics is employed principally (but not exclusively) at the first stage of the court's enquiry and suggesting that that that factor is given little credence at the second stage (aside from revisiting the level of intrusion into individual privacy caused by the story). More specifically, it will be argued that the media's intention to make 'good television' should not be relevant on its own, in the absence of evidence that this was manifested in actions that caused disproportionate harm to individual privacy. This will allow the court to respect the hybrid status of the media and its editorial discretion in considering the application of the public interest defence, whilst reflecting the detrimental effects of sensational broadcasting on individual privacy.

Before examining this further, let us recap on the effect of the major cases in this area. The decision of the European Court of Human Rights in *Peck v United Kingdom* provided the domestic courts, and broadcasting authorities and the media generally, useful guidance on the need of the latter to accommodate the right of individual privacy when carrying out their broadcasting and other duties. That decision not only exposed the weakness of domestic privacy laws, but also provided (albeit indirectly) a stark warning to broadcasting and other authorities of the respect they need to show to individual privacy. On the facts, no one would have any serious reservations regarding the decision – that *Peck* had been subject to an unnecessary intrusion into his private life, exacerbated by the tactics and lack of

[100] *Von Hannover v Germany* (2006) 43 EHRR 7, and *PJS v News Group Newspapers* [2016] AC 1081.

professionalism shown by all the authorities, including the media, even though they were not in the dock as such. Of course, such tactics are also relevant to the availability of any public interest defence, but in some cases, by the time the court considers the Article 10 issues, the battle is almost lost. In these cases, no possible public interest could justify those tactics, as they had been employed with no consideration of the individual's privacy (possibly, because at that time there was no legal obligation to consider that issue).

The key issue is now proportionality, and a careful balancing by the courts of the conflicting interests to show that any interference with private and family is necessary and proportionate to the aim of protecting freedom of expression, as required by the qualifying provision in Article 8(2). Further, in these cases, a key factor in determining whether the interference is proportionate and necessary (assuming that the claimant can satisfy the court that they had a reasonable expectation of privacy), is the extent to which the broadcast or other public dissemination serves the public interest. The courts' findings in *Ali* and *Richard* that the programmes, albeit broadcast on public interest matters, were not focussed on those matters but rather on the drama of the conflict between the claimants and the landlord's father, is of some concern to broadcasters and those interested in the free dissemination of public interest speech. Unlike *Peck*, where the focus is on the effect of the tactics (of the local authority) on the individual, the courts in *Richard* and *Ali* criticise the media for aiming to make good television, and thereby questioning the bona fides of the public interest defence in cases where the media have a dual purpose in making the programme.

Thus, in *Ali* the High Court and Court of Appeal accept that the conflict between the tenants and the landlord had been encouraged by one of the enforcement officers to "make good television" - thus reducing the genuine public interest in making and broadcasting the

programme.[101] It is submitted that this distinction between serving the public interest and making good or sensational television will be very difficult to maintain in practice, as many public interest stories are presented with mixed motives – to inform the public and to score political or personal points or entertain the audience. In the context of television programmes such as the one in *Ali*, it is inevitable that the programme is being made for both informative and entertainment purposes. Thus, for the courts to try to ascertain which of those purposes dominated in a particular case for ascertaining the success of any public interest defence will be both difficult and, for the reasons outlined above, potentially unfair.

That is not to argue, that the *decision* or *outcome* in *Ali* was necessarily unfair or wrong. The tactics employed by the broadcasters undoubtedly furthered the harm caused to the claimants – private individuals being filmed in their home - and the broadcasters should pay for that misjudgement when the court is assessing the strength of the privacy claim and whether, on balance, that intrusion was justified by any countervailing public interest. Yet to question that the media are attempting to carry out their public interest role in such cases is another matter, and may lead to a disproportionate burden being placed on broadcasters, together with the loss of the public interest defence in more appropriate cases. This is exacerbated by the fact that the Court of Appeal refused to question the High Court's weighting of both the public interest issue and the extent to which it had allowed sufficient editorial discretion.[102]

Similarly, in *Richard,* the public interest argument of the BBC was reduced and to some extent negated because of the tactics that it employed in both gathering the information and in

[101] [2019] EWCA Civ 677, at para 86

[102] *Ali v Channel 5 Broadcast Ltd* [2019] EWCA Civ 677, at paragraphs 92 and 93

broadcasting it as it did,[103] because the court questions the bona fides of the defence. These tactics, as has been conceded, are relevant to the decision on the overall proportionality of the media's interference with the claimant's privacy rights. However, it should not be allowed to dominate the balancing exercise if, as was clear in *Richard*, the investigation and broadcast concerned, initially at least, a matter of great public interest and debate. The tactics employed by the BBC clearly increased the harm caused to the claimant's privacy, and this factor was rightly reflected in the court's assessment of the strength of the claimant's expectation of privacy, and in the assessment of damages.[104] Yet, several parts of the judge's findings are predicated on the basis that the broadcasters in that case, and the media generally, should not concern themselves with making sensational and good television, stealing a march on its competitors, or boasting of its achievements in reporting the matter. This, it is argued, is inconsistent with editorial discretion, the hybrid status of the media, and the reality of making and reporting of public interest programmes. Further, these factors, as Lord Justice Irwin concedes in *Ali*, are the products of popular documentary television as an accepted form.[105]

The decisions in *Ali* and *Richard* are a reminder to broadcasters and the media generally that they must carry out their research and reporting in a responsible manner and be mindful of an

[103] See Jacob Rowbotham, 'Reporting Police Investigations, privacy rights and social stigma: Richard v BBC [2019 Journal of Media Law 115, at 127. Here the author sounds a general warning about the judge's dicta in *Richard*: 'While it is clear that Mann J was unimpressed with the conduct of the BBC, the ruling may have significant implications for media reporting, which will need to be addressed in future cases.

[104] Unless one argues that, the claimant's expectation of privacy was substantially reduced by his fame and Christian views. This argument will not be re-examined in this article, but see Steve Foster, Media Responsibility, Public Interest Broadcasting and the Judgment in *Richard v BBC'* [2016] 5 EHRLR 490, at 500-501

[105] *Ali v Channel 5 Broadcast Ltd* [2019] EWCA Civ 677, at paragraph 89.

individual's privacy and Convention rights. In both *Richard* and *Ali,* it could be argued that on the facts it was appropriate to interfere with the editorial judgement of the media and thus protect individuals from an unreasonable and unnecessary intrusion into their private lives. This will be acceptable provided these cases are rare, and do not intrude too greatly on broadcasting freedom and the public right to receive public interest information. However, the courts need to develop a clear and coherent set of principles that clearly distinguish between unprofessional and unacceptable journalism and reasonable and inevitable press tactics in creating a story that not only informs but which engages and entertains the audience. Further, appeal courts need to be more robust in questioning the application of those rules by courts of first instance. If this is not ensured, then many public interest defences will fail in situations where the public interest value of the story is strong and the resultant intrusion into privacy is justifiable.

Most importantly, the courts must accept that the media will and must try to make 'good television', including, and perhaps especially, in cases where the story has a high public interest. Media bodies are not formal public bodies and should not be expected to act as if they were carrying out a public office and function. Of course, they are recognised as carrying out a public service and benefit – providing information to the public on matters of public interest. However, that should not mean that the courts should ignore the fact that they need to survive commercially in a competitive field by attracting its audience, and engaging and at times entertaining that audience.

Conclusions

Insofar as the decisions in *Richard* and *Ali* attempt to impose standards of responsible broadcasting on programme makers, and consider that factor in the both the first stage and, to

a lesser extent, the overall balancing exercise, the decisions are unobjectionable. However, where courts take into account the broadcaster's purpose to entertain in order to reduce the public interest nature of the broadcast, we need to be careful that the courts do not ignore the public interest value of the broadcast simply or mainly because the media wished to make a 'good' programme or story. Not only are the media private companies who do and must make a profit, they are responsive to their readership to, within reason, entertain their readers or audience More specifically, we need to ensure that programmes made by certain companies, and broadcast on certain channels, are not *assumed* to have been made for purely financial or prurient reasons.

One way in which this can be achieved, is to concentrate the enquiry into media tactics at the first stage, and assess the impact of those tactics on the victim's privacy. This will more easily assess the media's responsibility for harming individual privacy, rather than questioning their motives and editorial discretion at the second stage of the enquiry. Of course, their motives and tactics have *some* relevance to the success of the public interest defence and the overall balancing exercise because the level of intrusion has to be justified by that public interest. However, by focussing attention on that factor at the first stage it is hoped that the courts will refrain from making general statements with respect to the media's motives that are both harmful to media freedom and unreflective of the true status of modern broadcasting and publishing.

Most importantly, the courts must accept that the media will and must try to make 'good television', including, and perhaps especially, in cases where the story has a high public interest. Media bodies are not expected to act as if they were carrying out a formal public function. Of course, they are regarded as carrying out a public service and benefit – providing

information to the public on matters of public interest – but that should not mean that we have to ignore the fact that they need to survive commercially in a competitive field by attracting its audience and engaging and, at times, entertaining that audience. The author accepts the point that the media have survived despite fears that modern privacy law and judicial interference would lead to the death of media freedom.[106] However, we need to be careful that broadcasting authorities are not castigated simply because they are carrying out their natural desire to entertain their audience, and to make 'good television'.

[106] See Thomas Bennett and Paul Wragg, 'Was Richard v BBC correctly decided?' (2018) 23(3) Communications Law 153, at 163.